

FILED IN THE
U.S. DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WASHINGTON

UNITED STATES OF AMERICA,

Plaintiff,

v.

FAINYAN KAIN JAMES KIMMERLY,

Defendant.

Case No. 2:20-CR-00013-TOR-1

Plea Agreement

Pursuant to Federal Rule of
Criminal Procedure 11(c)(1)(C)

Plaintiff United States of America, by and through Vanessa R. Waldref, United States Attorney for the Eastern District of Washington, and David M. Herzog, Assistant United States Attorney for the Eastern District of Washington, and Defendant FAINYAN KAIN JAMES KIMMERLY ("Defendant"), both individually and by and through Deputy Federal Defender Colin Prince, hereby agree to the following Plea Agreement.

1. Guilty Plea and Maximum Statutory Penalties For Criminal Charges

Pursuant to Federal Rule of Criminal Procedure 11(c)(1)(C) ("Rule 11(c)(1)(C)"), Defendant agrees to enter a plea of guilty to an Information Superseding Indictment charging Defendant with one count of Online Enticement, in violation of 18 U.S.C. § 2422(b), a Class A felony.

1 Defendant understands that Online Enticement, in violation of 18 U.S.C.
2 § 2422(b), carries the following potential penalties: a term of imprisonment of no less
3 than 10 years and up to a lifetime; a term of supervised release of not less than 5 years
4 and up to a lifetime; a fine of up to \$250,000; restitution; mandatory registration as a
5 sex offender; a \$100 special penalty assessment; and, absent a judicial finding of
6 indigence, an additional mandatory special assessment of \$5,000 pursuant to the
7 Justice for Victims of Trafficking Act (“JVTA”) of 2015.

8 Defendant also understands and agrees that because he enticed a minor to
9 engage in conduct that involved the production of child pornography, the Court shall
10 also impose an additional special assessment of up to than \$50,000 on Defendant,
11 pursuant to 18 U.S.C. §§ 2259, 2259A.

12 Defendant also understands and agrees that a violation of a condition of
13 supervised release carries an additional penalty of re-imprisonment for all or part of
14 the term of supervised release, pursuant to 18 U.S.C. § 3583(e)(3), without credit for
15 time previously served on post-release supervision. Defendant also understands that
16 he will be required to pay restitution and register as a sex offender.

17 2. The Court is Not a Party to the Agreement

18 The Court is not a party to this Plea Agreement and may accept or reject it.
19 Defendant understands that sentencing is a matter solely within the discretion of the
20 Court; that the Court is under no obligation to accept any recommendations made by
21 the United States and/or by Defendant; that the Court will obtain an independent
22 report and sentencing recommendation from the U.S. Probation Office; and that the
23 Court may, in its discretion, impose any sentence it deems appropriate, up to the
24 statutory maximums stated in this Plea Agreement.

25 3. Rule 11 Nature of the Plea Agreement

26 Defendant acknowledges that this Plea Agreement is entered pursuant to Rule
27 11(c)(1)(C).
28

1 Pursuant to Rule 11(c)(1)(C), the United States and Defendant agree that the
2 appropriate disposition of the case is 144 months (12 years) in custody, to be followed
3 by a lifetime of Supervised Release. The United States and Defendant agree to make
4 those sentencing recommendations to the Court. Although the United States and
5 Defendant agree to make these recommendations to the Court pursuant to Rule
6 11(c)(1)(C), Defendant acknowledges that no promises of any type have been made to
7 him with respect to the sentence the Court will ultimately impose.

8 Defendant understands that the Court is required to consider the applicable
9 Guidelines sentencing range, but may vary upward or downward from that sentencing
10 range.

11 Defendant understands that he may withdraw from this Plea Agreement if the
12 Court imposes a term of imprisonment of greater than 144 months. Defendant also
13 understands that the United States may withdraw from this Plea Agreement if the
14 Court imposes a term of imprisonment of less than 144 months or a term of supervised
15 release of less than Defendant's lifetime.

16 Defendant and the United States acknowledge that the imposition of any fine,
17 restitution, or conditions of supervised release are not part of the Rule 11(c)(1)(C)
18 nature of this Plea Agreement; that parties are free to make any recommendation they
19 deem appropriate as to the imposition of a fine, restitution, or conditions of supervised
20 release; and that the Court will exercise its discretion in this regard. Defendant and
21 the United States acknowledge that the Court's decisions regarding the imposition of a
22 fine, restitution, or conditions of supervised release will not provide a basis to
23 withdraw his guilty plea or withdraw from this Rule 11(c)(1)(C) Plea Agreement.

24 Defendant understands that this Plea Agreement does not limit any law
25 enforcement agency or prosecuting authority from investigating and/or charging
26 Defendant with any new criminal conduct or violations of Supervised Release that
27 arise during or after his incarceration on these charges.
28

1 Defendant acknowledges that if either he or the United States successfully
2 withdraws from this Plea Agreement, the Plea Agreement becomes a nullity, and
3 neither he nor the United States are bound by any representations within it.

4 4. Effect on Immigration Status

5 Defendant recognizes that pleading guilty may have consequences with respect
6 to his immigration status if he is not a citizen of the United States. Under federal law,
7 a broad range of crimes may be removable offenses, including the offense to which
8 Defendant is pleading guilty. Removal and other immigration consequences are the
9 subject of a separate proceeding, however, and Defendant understands that while
10 deportation and/or removal appears to be a virtual certainty if he is not a citizen of the
11 United States, no one, including his attorney or the District Court, can predict with
12 absolute certainty the effect of his conviction on his immigration status. Defendant
13 nevertheless affirms that he wants to plead guilty regardless of any immigration
14 consequences that his plea may entail, even if automatic removal from the United
15 States is a virtual certainty if he is not a United States citizen.

16 5. Waiver of Constitutional Rights

17 Defendant understands that by entering this guilty plea, Defendant is knowingly
18 and voluntarily waiving certain constitutional rights, including:

- 19 a. The right to a jury trial;
20 b. The right to see, hear and question the witnesses;
21 c. The right to remain silent at trial;
22 d. The right to testify at trial; and
23 e. The right to compel witnesses to testify.

24 While Defendant is waiving certain constitutional rights, Defendant understands
25 that Defendant retains the right to be assisted through the sentencing and any direct
26 appeal of the conviction and sentence by an attorney, who will be appointed at no cost
27 if Defendant cannot afford to hire an attorney.
28

1 Defendant expressly waives his right to bring pretrial motions and
2 acknowledges that any defense motions currently pending before the Court are
3 mooted by this Plea Agreement.

4 6. Elements of the Offense

5 The United States and Defendant agree that in order to convict Defendant of
6 Online Enticement, in violation of 18 U.S.C. § 2422(b), as charged in the Information
7 Superseding Indictment, the United States would have to prove beyond a reasonable
8 doubt the following:

- 9 a. *First*, between on or about June 30, 2019, and on or about July 2,
10 2019, within the Eastern District of Washington, Defendant used a
11 facility or means of interstate commerce, namely, the Internet, to
12 persuade, induce, entice, or coerce an individual who had not
13 attained the age of 18 years, to engage in sexual activity;
14 b. *Second*, Defendant could have been charged with a criminal
15 offense for that sexual activity, namely, Production of Child
16 Pornography, in violation of 18 U.S.C. § 2251(a), (e); and
17 c. *Third*, Defendant acted knowingly.

18 7. Factual Basis and Statement of Facts

19 The United States and Defendant stipulate and agree that the following facts are
20 accurate; that the United States could prove these facts beyond a reasonable doubt at
21 trial; and that these facts constitute an adequate factual basis for Defendant's guilty
22 plea. This statement of facts does not preclude either party from presenting and
23 arguing, for sentencing purposes, additional facts that are relevant to the Guidelines
24 computation or sentencing, unless otherwise prohibited in this Agreement.

25 Beginning on June 30, 2019, and continuing through July 2, 2019, within the
26 Eastern District of Washington, Defendant knowingly used the social media platform
27 Facebook, and the Internet, to entice a person who had not attained the age of 18 years
28

1 to engage in sexual activity for which Defendant could have been charged with a
2 criminal offense; namely, Production of Child Pornography, in violation of 18 U.S.C.
3 § 2251(a), (e). Defendant acknowledges that the Internet is a means and facility of
4 interstate and foreign commerce, and that he used the Internet to engage in his
5 communications with the minor in this case.

6 In Facebook messenger exchanges with a minor who was 13 years old at the
7 time, Defendant explicitly requested that the minor take sexually explicit images of
8 the minor's own body, and send those images to Defendant using Facebook
9 messenger. Defendant acknowledges that the images that he instructed the minor to
10 take and send him depict the lewd and lascivious depiction of the minor's genitals,
11 and thus constitute child pornography under federal law. Accordingly, Defendant
12 acknowledges that he used the Internet to entice the minor to record and produce
13 images of child pornography. Defendant acknowledges that for this underlying
14 conduct, he could have been charged with a criminal offense, namely, Production of
15 Child Pornography, in violation of 18 U.S.C. § 2251(a), (e). Defendant acknowledges
16 that he knowingly used the Internet to request that the minor obtain and send him
17 images of child pornography, and that he did so knowing that the minor had not
18 attained the age of 18 years.

19 Defendant acknowledges that he specifically requested that the minor touch the
20 minor's own genitals and send him images of that conduct via the Internet and
21 Facebook messenger, which the minor did. Defendant acknowledges that this conduct
22 constituted "sexual contact" for purposes of the United States Sentencing Guidelines.

23 Defendant acknowledges that the minor was between the ages of 12 and 16
24 when he communicated with the minor, that the cellular telephone he used to make the
25 requests and receive the images is a "computer" for purposes of the United States
26 Sentencing Guidelines, and that when he asked the minor to send him images, he was
27 knowingly requesting that the minor distribute images of child pornography to him.
28

1 Defendant acknowledges that in 2010, he sustained a juvenile conviction in
2 Spokane county for Child Molestation in the First Degree, and that at all times
3 relevant to the Information Superseding Indictment, he was required to register as a
4 sex offender under Washington law.

5 8. Agreement Not to Bring Other Charges

6 The United States and Defendant agree that the Information Superseding
7 Indictment supersedes and replaces the Indictment filed on February 4, 2020, which
8 charges Defendant with Production of Child Pornography, in violation of 18 U.S.C.
9 § 2251(a), (e), and that the United States and Defendant are proceeding on the
10 Information Superseding Indictment for purposes of resolving this case.

11 Accordingly, the United States Attorney's Office for the Eastern District of
12 Washington agrees that so long as Defendant pleads guilty to the Online Enticement
13 charge in the Information Superseding Indictment on or before February 17, 2021, the
14 United States Attorney's Office for the Eastern District of Washington will not
15 proceed on a substantive Production of Child Pornography charge, or any other
16 federal charge, against Defendant that is based on information in the possession,
17 custody, and control of the United States Attorney's Office for the Eastern District of
18 Washington on February 17, 2022.

19 If Defendant breaches this Plea Agreement or does not plead guilty to the
20 Information Superseding Indictment on February 17, 2022, the United States may
21 seek to withdraw the Information Superseding Indictment and proceed on the
22 underlying Indictment, file or renew charges against Defendant, or take any other
23 action to prosecute Defendant for Production of Child Pornography and/or any other
24 conduct in violation of federal law. Defendant understands that the United States may
25 prosecute Defendant for any other past unlawful conduct or any unlawful conduct that
26 occurs after February 17, 2022, so long as the conduct was not known to the United
27 States Attorney's Office for the Eastern District of Washington on February 17, 2022.
28

9. United States Sentencing Guideline Calculations

Defendant understands and acknowledges that the United States Sentencing Guidelines (“U.S.S.G.” or “Guidelines”) apply and that the Court will determine Defendant’s advisory range at the time of sentencing, pursuant to the Guidelines. Defendant and the United States agree to the following Guidelines calculations.

a. Calculations Under Chapters 2 and 3

The United States and Defendant agree that, absent the application of the cross-reference set forth at U.S.S.G. § 2G1.3(c)(1), the following calculations apply to Online Enticement, in violation of 18 U.S.C. § 2422(b):

Base Offense Level and Adjustments		Guideline Section
Online Enticement	28	U.S.S.G. § 2G1.3(a)(3)
Use of a Computer to Solicit Participation	+2	U.S.S.G. § 2G2.1(b)(3)
Sexual Contact	+2	U.S.S.G. § 2G2.1(b)(4)(A)
Total	32	

However, the United States and Defendant agree that the cross-reference set forth at U.S.S.G. § 2G1.3(c)(1) applies in this case, because Defendant’s conduct included specifically requesting that the minor take and send him images containing the lewd and lascivious depiction of the minor’s genitals. The United States and Defendant agree that this conduct involved causing a minor to engage in sexually explicit conduct for the purpose of producing a visual depiction of that conduct. Accordingly, the United States and Defendant agree that because the Guidelines calculations are higher under U.S.S.G. § 2G2.1 than under U.S.S.G. § 2G1.3, the following calculations apply to the Guidelines calculations under Chapters 2 and 3:

Base Offense Level and Adjustments		Guideline Section
Production of Child Pornography	32	U.S.S.G. § 2G2.1(a)(1)
Victim Between Ages of 12-16	+2	U.S.S.G. § 2G2.1(b)(1)(B)
Sexual Contact (minor touching own genitals)	+2	U.S.S.G. § 2G2.1(b)(2)(A)
Distribution (from minor to Defendant)	+2	U.S.S.G. § 2G2.1(b)(3)
Use of a Computer	+2	U.S.S.G. § 2G2.1(b)(6)(B)(i), (ii)
Total	40	

1 b. Repeat and Dangerous Sex Offender Under Chapter 4

2 The United States and Defendant also agree that under Chapter 4 of the United
3 States Sentencing Guidelines, Defendant is a Repeat and Dangerous Sex Offender.

4 The United States and Defendant agree that Defendant's instant offense is a
5 "covered sex crime" under U.S.S.G. § 4B1.5(b)(1) because it is an "offense,
6 perpetrated against a minor" under 18 U.S.C. § 2422(b), which falls under Chapter
7 117 of the United States Code, and it is not a crime of transmitting information about
8 a minor or filing a factual statement about an alien individual. U.S.S.G. § 4B1.5, App.
9 Note 2.

10 The United States and Defendant agree that Defendant committed the instant
11 offense of conviction subsequent to sustaining at least one "sex offense conviction,"
12 namely, Defendant's 2010 conviction in Spokane county for Child Molestation in the
13 First Degree. The United States and Defendant agree that Defendant's child
14 molestation conduct is an offense described in 18 U.S.C. § 2426(b)(1)(A) that was
15 perpetrated against a minor, but was not a child pornography offense.

16 Accordingly, pursuant to U.S.S.G. § 4B1.5(a)(1), the United States and
17 Defendant agree that Defendant's offense level is the greater of the offense level
18 determined under Chapters 2 and 3 or the offense level determined by the table in
19 U.S.S.G. § 4B1.5(1)(B). The United States and Defendant agree that because the
20 statutory maximum for the offense of Online Enticement in violation of 18 U.S.C.
21 § 2422(b) is life imprisonment, Defendant's offense level determined by the table in
22 U.S.S.G. § 4B1.5(1)(B) is offense level 37. The United States and Defendant agree
23 that Defendant's offense level under Chapters 2 and 3 is 40. Accordingly, the United
24 States and Defendant agree that his offense level is 40.

25 Pursuant to U.S.S.G. § 4B1.5(a)(2), the United States and Defendant agree that
26 Defendant's criminal history category shall be the criminal history category
27 determined under Chapter 4 or Criminal History Category V, whichever is greater.
28

1 c. Recommendations to the Court

2 The United States and Defendant agree not to dispute or challenge any of the
3 Guidelines analyses or calculations set forth herein. Regardless of any calculations
4 made by the United States Probation Office or Court, the United States and Defendant
5 agree to: (a) make Guidelines and sentencing recommendations and arguments
6 consistent with this Plea Agreement; and (b) recommend that the Court impose a final
7 sentence of 12 years (144 months), followed by a lifetime of supervised release.

8 d. No Other Agreements

9 The United States and Defendant have no other agreements regarding the
10 Guidelines or the application of any Guidelines enhancements, departures, or
11 variances. Defendant understands and acknowledges that so long as the United States
12 recommends a total sentence of incarceration of 12 years (144 months), the United
13 States is free to make any sentencing arguments it sees fit, including arguments arising
14 from Defendant's uncharged conduct, conduct set forth in charges that will be
15 dismissed pursuant to this Agreement, and Defendant's relevant conduct.

16 e. Acceptance of Responsibility

17 The United States will recommend that Defendant receive a three-level
18 downward adjustment for acceptance of responsibility, pursuant to U.S.S.G.
19 § 3E1.1(a), (b), if Defendant: accepts this Plea Agreement and enters a guilty plea on
20 February 17, 2022; demonstrates a recognition and an affirmative acceptance of
21 personal responsibility for his criminal conduct; provides complete and accurate
22 information during the sentencing process; and does not commit any obstructive
23 conduct. Defendant and the United States agree that the United States may at its
24 option and upon written notice to Defendant, not recommend a downward reduction
25 for acceptance of responsibility if, prior to the imposition of sentence, Defendant is
26 charged with, or convicted of, any criminal offense, or if Defendant tests positive for
27 any controlled substance.
28

1 f. Criminal History

2 The United States and Defendant have no agreement and make no
3 representations as to Defendant's criminal history category, which will be determined
4 by the Court after the Presentence Investigative Report is completed.

5 10. Incarceration

6 Pursuant to Rule 11(c)(1)(C), the United States and Defendant agree that a fair
7 and just term of incarceration for Defendant is 12 years (144 months), to be followed
8 by a lifetime term of supervised release. The United States and Defendant each agree
9 to recommend this sentence to the Court.

10 If the Court does not accept Defendant's guilty plea or Plea Agreement, or
11 sentences Defendant to a term of imprisonment greater or lesser than 12 years (144
12 months) or a term of Supervised Release that is less than the remainder of Defendant's
13 lifetime, Defendant and/or the United States may withdraw from this Plea Agreement
14 and the Agreement will be null and void.

15 11. Supervised Release

16 The United States and Defendant agree to recommend a lifetime term of
17 supervised release. The United States and Defendant have no agreement as to the
18 conditions of supervised release that the Court will impose, except as set forth below.

19 Defendant acknowledges that the Court's decision regarding the conditions of
20 Supervised Release is final, non-appealable, and not part of the Rule 11(c)(1)(C)
21 nature of this Plea Agreement; that is, even if Defendant is unhappy with the
22 conditions of Supervised Release ordered by the Court, that will not be a basis to
23 withdraw his guilty plea, withdraw from this Plea Agreement, or appeal his
24 conviction, sentence, or term of Supervised Release.

25 The United States and Defendant agree to recommend that in addition to the
26 standard and special conditions of supervised release that are imposed in all child sex
27 offender cases in this District, the Court impose the following conditions:
28

- 1 a. Defendant shall not contact the minor victim in any manner,
2 whether directly or indirectly, or through an intermediary.
3 Defendant acknowledges that this condition is the equivalent of a
4 state court keep-away order.
- 5 b. The United States Probation Officer may conduct, upon reasonable
6 suspicion, and with or without notice, a search of Defendant's
7 person, residences, offices, vehicles, belongings, and areas under
8 Defendant's exclusive or joint control.
- 9 c. Defendant shall report to the Probation Office any and all
10 electronic communications service accounts, as defined in 18
11 U.S.C. § 2510(15) used for user communications, dissemination
12 and/or storage of digital media files (i.e. audio, video, images).
13 This includes, but is not limited to, email accounts, social media
14 accounts, and cloud storage accounts. Defendant shall provide
15 each account identifier and password, and shall report the creation
16 of new accounts, changes in identifiers and/or passwords, transfer,
17 suspension and/or deletion of any account within 5 days of such
18 action. Failure to provide accurate account information may be
19 grounds for revocation. The Probation Office is permitted to
20 access and search any accounts using Defendant's credentials
21 pursuant to this condition only when reasonable suspicion exists
22 that Defendant has violated a condition of his supervision and that
23 the accounts to be searched contain evidence of this violation.

24 12. Criminal Fine

25 The United States and Defendant are free to make whatever recommendation
26 concerning the imposition of a criminal fine that they believe is appropriate.
27
28

1 Defendant acknowledges that the Court's decision regarding a fine is final, non-
2 appealable, and not part of the Rule 11(c)(1)(C) nature of this Plea Agreement; that is,
3 even if Defendant is unhappy with a fine ordered by the Court, that will not be a basis
4 to withdraw his guilty plea, withdraw from this Plea Agreement, or appeal his
5 conviction, sentence, or fine.

6 13. Mandatory Special Penalty Assessment

7 Defendant agrees to pay the \$100 mandatory special penalty assessment to the
8 Clerk of Court for the Eastern District of Washington, at or before sentencing,
9 pursuant to 18 U.S.C. § 3013 and shall provide a receipt from the Clerk to the United
10 States before sentencing as proof of this payment. Defendant agrees that pursuant to
11 the JVT A, an additional mandatory special assessment of \$5,000 must be imposed
12 upon conviction, absent a judicial finding of indigence.

13 14. Judicial Forfeiture

14 Defendant agrees to voluntarily forfeit and relinquish to the United States all
15 right, title and interest in all assets listed herein, and hereby agrees to execute any and
16 all forms and pleadings necessary to effectuate such forfeiture of any such assets,
17 including, but not limited to the following:

- 18 - a T-Mobile Revvl cellular telephone, IMEI 354133101005149

19 Defendant stipulates that Defendant is the sole owner of any assets identified in
20 this Plea Agreement and that no one else has an interest in these assets.

21 Defendant acknowledges that any assets listed above that Defendant is agreeing
22 to forfeit are subject to forfeiture, pursuant to 18 U.S.C. § 2428, as property used or
23 intended to be used in any manner or part to commit or to facilitate the commission of
24 Online Enticement, in violation of 18 U.S.C. § 2422(b), the charge to which
25 Defendant is pleading guilty.

1 Defendant agrees to take all steps as requested by the United States to pass clear
2 title to the assets to the United States, and to testify truthfully in any forfeiture
3 proceeding.

4 Defendant agrees to hold all law enforcement agents/officers, and the United
5 States, its agents, and its employees harmless from any claims whatsoever arising in
6 connection with the seizure and forfeiture of any asset covered by this Plea
7 Agreement.

8 Defendant waives further notice of any federal, state or local proceedings
9 involving the forfeiture of the seized assets the Defendant is agreeing to forfeit in this
10 Plea Agreement.

11 Defendant further agrees to waive all constitutional, equitable and statutory
12 challenges in any manner (including direct appeal, habeas corpus, or any other means)
13 to any forfeiture carried out in accordance with this Plea Agreement on any grounds,
14 including that the forfeiture constitutes an excessive fine or punishment.

15 Defendant knowingly and voluntarily waives his right to a jury trial on the
16 forfeiture of the assets.

17 Defendant waives oral pronouncement of forfeiture at the time of sentencing,
18 and any defects that may pertain to the forfeiture.

19 15. Restitution

20 The United States and Defendant agree that restitution is required. *See* 18
21 U.S.C. §§ 2259, 2259A, 3663, 3663A, 3664. Defendant acknowledges that
22 restitution is mandatory, without regard to Defendant's economic situation, to any
23 identifiable victims, in an amount that comports with Defendant's relative role in
24 the causal process that underlies their general losses. *See Paroline v. United States*,
25 572 U.S. 464 (2014); 18 U.S.C. § 2259.

26 Pursuant to 18 U.S.C. § 3663(a)(3), in exchange for the United States
27 dismissing counts and/or agreeing not to bring additional charges, Defendant
28

1 voluntarily agrees to pay restitution to all victims of child pornography that
2 Defendant produced, distributed, received, and/or possessed, as set forth in the
3 discovery in this case, whether or not Defendant enters a plea of guilty to counts
4 charging that specific conduct, and whether or not such counts are foregone
5 pursuant to this Plea Agreement.

6 Defendant understands that for purposes of 18 U.S.C. § 2259, “victim”
7 means the individual harmed as a result of a commission of the crime, including, in
8 the case of a victim who is under 18 years of age, the legal guardian of the victim.
9 The United States and the Defendant also hereby stipulate and agree that the Court
10 shall order full restitution, as appropriate, to any entity, organization, insurance
11 company, individual, and/or medical provider who provided medical services
12 and/or funds related to the treatment of any victim.

13 Pursuant to 18 U.S.C. § 2259A(a)(3), Defendant agrees that his conviction of
14 Online Enticement, where the underlying predicate is Production of Child
15 Pornography, constitutes a “child pornography production” offense, such that the
16 Court shall assess an amount of up to \$50,000, in addition to any other criminal
17 penalty, restitution, or special assessment authorized by law. Defendant agrees that
18 these restitution and Special Assessment provisions apply with regard to the minor
19 described in the Factual Basis of this Plea Agreement because Defendant
20 knowingly caused that minor to take and distribute images of child pornography to
21 Defendant.

22 The United States and Defendant have the following restitution agreements:

23 a. Restitution Amount and Interest

24 The United States and Defendant stipulate and agree that, pursuant to 18 U.S.C.
25 §§ 3663, 3663A and 3664, the Court should order restitution in an amount that
26 comports with the actual losses of any victim, of no less than \$3,000, and that any
27 interest on this restitution amount, if any, should be waived.
28

1 b. Payments

2 To the extent restitution is ordered, the United States and Defendant agree that
3 the Court will set a restitution payment schedule based on Defendant's financial
4 circumstances. *See* 18 U.S.C. § 3664(f)(2), (3)(A). Regardless, Defendant agrees to
5 pay not less than 10% of Defendant's net monthly income towards Defendant's
6 restitution obligations.

7 c. Treasury Offset Program and Collection

8 Defendant understands the Treasury Offset Program ("TOP") collects
9 delinquent debts owed to federal agencies. If applicable, the TOP may take part or all
10 of Defendant's federal tax refund, federal retirement benefits, or other federal benefits
11 and apply these monies to Defendant's restitution obligations. *See* 26 U.S.C.
12 § 6402(d); 31 U.S.C. § 3720A; 31 U.S.C. § 3716.

13 Defendant understands that the United States may, notwithstanding the Court-
14 imposed payment schedule, pursue other avenues to ensure the restitution obligation is
15 satisfied, including, but not limited to, garnishment of available funds, wages, or
16 assets. *See* 18 U.S.C. §§ 3572, 3613, and 3664(m). Nothing in this acknowledgment
17 shall be construed to limit Defendant's ability to assert any specifically identified
18 exemptions as provided by law, except as set forth in this Plea Agreement.

19 Until a fine or restitution order is paid in full, Defendant agrees fully to disclose
20 all assets in which Defendant has any interest or over which Defendant exercises
21 control, directly or indirectly, including those held by a spouse, nominee or third
22 party. Until such time as the fine or restitution order is paid in full, Defendant agrees
23 to provide waivers, consents or releases requested by the U.S. Attorney's Office to
24 access records to verify the financial information.

25 d. Notifications and Waivers

26 Defendant agrees to notify the Court and the United States of any material
27 change in Defendant's economic circumstances (e.g., inheritances, monetary gifts,
28

1 changed employment, or income increases) that might affect Defendant's ability to
2 pay restitution. *See* 18 U.S.C. § 3664(k). Defendant agrees to notify the United
3 States of any address change within 30 days of that change. *See* 18 U.S.C.
4 § 3612(b)(1)(F). These obligations ceases when Defendant's restitution is paid-in-
5 full.

6 Defendant acknowledges that the Court's decision regarding restitution is final,
7 non-appealable, and not part of the Rule 11(c)(1)(C) nature of this Plea Agreement;
8 that is, even if Defendant is unhappy with the amount of restitution ordered by the
9 Court, that will not be a basis to withdraw Defendant's guilty plea, withdraw from this
10 Plea Agreement, or appeal Defendant's conviction, sentence, or restitution order.

11 16. Payments While Incarcerated

12 If Defendant lacks the financial resources to pay the monetary obligations
13 imposed by the Court, he agrees to earn money to pay toward these obligations by
14 participating in the Bureau of Prisons' Inmate Financial Responsibility Program.

15 17. Additional Violations of Law Can Void Plea Agreement

16 The United States and Defendant agree that the United States may, at its option
17 and upon written notice to the Defendant, withdraw from this Plea Agreement or
18 modify its sentencing recommendation if, prior to the imposition of sentence,
19 Defendant is charged with or convicted of any criminal offense or tests positive for
20 any controlled substance.

21 18. Waiver of Appeal Rights

22 In return for the concessions that the United States has made in this Plea
23 Agreement, Defendant agrees to waive Defendant's right to appeal Defendant's
24 conviction and sentence if the Court imposes a term of imprisonment consistent with
25 the terms of this Rule 11(c)(1)(C) plea agreement, including the requirement that
26 Defendant must register as a sex offender upon Defendant's release from custody.

1 If the Court indicates its intent to impose a sentence above the Rule 11(c)(1)(C)
2 terms of this Agreement and Defendant chooses *not* to withdraw, then Defendant may
3 appeal only if the Court imposes a sentence higher than the top of the Guidelines
4 range consistent with the calculations set forth herein, and may appeal only the
5 substantive reasonableness of Defendant's sentence.

6 Defendant expressly waives Defendant's right to appeal any restitution order
7 imposed by the Court.

8 Defendant expressly waives the right to file any post-conviction motion
9 attacking Defendant's conviction and sentence, including a motion pursuant to 28
10 U.S.C. § 2255, except one based on ineffective assistance of counsel arising from
11 information not now known by Defendant and which, in the exercise of due diligence,
12 Defendant could not know by the time the Court imposes sentence.

13 Should Defendant successfully move to withdraw from this Plea Agreement or
14 should Defendant's conviction be set aside, vacated, reversed, or dismissed under any
15 circumstance, this Plea Agreement shall become null and void and the United States
16 may prosecute Defendant on all available charges.

17 Nothing in this Plea Agreement shall preclude the United States from opposing
18 a post-conviction motion for a reduction of sentence or other attack upon the
19 conviction or sentence, including but not limited to, writ of habeas corpus proceedings
20 brought under 28 U.S.C. § 2255.

21 19. Sex Offender Registration

22 Defendant understands that by pleading guilty, Defendant will be required to
23 register as a sex offender upon release from prison as a condition of supervised
24 release, pursuant to 18 U.S.C. § 3583(d).

25 Defendant also understands that independent of Defendant's term of supervised
26 release, Defendant will be subject to federal and state sex offender registration
27 requirements, and that those requirements may apply throughout Defendant's lifetime.
28

1 Defendant agrees that during the duration of Defendant's registration
2 requirement, Defendant will keep Defendant's registration current with the state sex
3 offender registration agency or agencies of any state in which Defendant lives or
4 resides for more than 72 hours.

5 Defendant agrees that during the duration of Defendant's registration
6 requirement, Defendant will notify and verify with the state sex offender registration
7 agency or agencies of any state in which Defendant lives or resides for more than 72
8 hours, of changes to Defendant's name, place of residence, place of employment,
9 education, or religious worship, and any other information required by such agency or
10 agencies. Defendant understands that Defendant will be subject to possible federal
11 and state penalties for failure to comply with any such requirements. Defendant
12 understands that under 18 U.S.C. § 4042(c), notice will be provided to certain law
13 enforcement agencies upon Defendant's release from confinement.

14 As a condition of Supervised Release, Defendant shall initially register with the
15 state sex offender registration of the state of Defendant's release, and shall also
16 register with the state sex offender agency in any state where defendant resides, is
17 employed, works, or is a student, as directed by the Probation Officer.

18 Defendant shall provide proof of registration to the Probation Officer within 72
19 hours of release.

20 20. Withdrawal or Vacatur of Defendant's Plea

21 Should Defendant successfully move to withdraw from this Plea Agreement or
22 should Defendant's conviction be set aside, vacated, reversed, or dismissed under any
23 circumstance, then the following provisions will apply:

- 24 a. This Plea Agreement shall become null and void;
- 25 b. The United States may prosecute Defendant on any count to which
26 Defendant has pleaded guilty, as well as any other available
27 charge;
- 28

- 1 c. The United States may reinstate any counts that have been
2 dismissed, have been superseded by the filing of an Information, or
3 were not charged because of this Plea Agreement;
- 4 d. The United States may file any new charges that would otherwise
5 be barred by this Agreement;
- 6 e. The United States may prosecute Defendant on all available
7 charges involving or arising from the incidents charged in any
8 charging instrument in this case;
- 9 f. The decision to pursue any or all of these options is solely in the
10 discretion of the United States Attorney's Office;
- 11 g. Defendant agrees to waive any objections, motions, and defenses
12 Defendant might have to the United States' decision about how to
13 proceed, including a claim that the United States has violated
14 Double Jeopardy; and
- 15 h. Defendant agrees not to raise any objections based on the passage
16 of time, including but not limited to, alleged violations of any
17 statutes of limitation or any objections based on the Speedy Trial
18 Act or the Speedy Trial Clause of the Sixth Amendment.

19 21. Waiver of Attorney Fees and Costs

20 Defendant agrees to waive all rights Defendant may have under the "Hyde
21 Amendment," Section 617, P.L. 105- 119 (Nov. 26, 1997), to recover attorneys' fees
22 or other litigation expenses in connection with the investigation and prosecution of all
23 charges in the above-captioned matter and of any related allegations (including
24 without limitation any charges to be dismissed pursuant to this Plea Agreement or any
25 charges previously dismissed or not brought as a result of this Plea Agreement).

26
27
28

22. Integration Clause

The United States and Defendant acknowledge that this document constitutes the entire Plea Agreement between the United States and Defendant, and no other promises, agreements, or conditions exist between the United States and Defendant concerning the resolution of the case. This Plea Agreement is binding only on the United States Attorney's Office for the Eastern District of Washington, as set forth herein, and cannot bind other federal, state, or local authorities. The United States and Defendant agree that this Agreement cannot be modified except in a writing that is signed by the United States and Defendant.

Approvals and Signatures

Agreed and submitted on behalf of the United States Attorney's Office for the Eastern District of Washington.

Vanessa R. Waldref
United States Attorney



David M. Herzog
Assistant United States Attorney

2/17/2022
Date

I have read this Plea Agreement and have carefully reviewed and discussed every part of the agreement with my attorney. I understand and voluntarily enter into this Plea Agreement. I have consulted with my attorney about my rights, I understand those rights, and I am satisfied with the representation of my attorney in this case. No other promises or inducements have been made to me, other than those contained in this Plea Agreement and no one has threatened or forced me in any way to enter into this Plea Agreement. I agree to plead guilty because I am guilty.



FAINYAN KAIN JAMES KIMMERLY
Defendant

2-17-22
Date

1 I have read the Plea Agreement and have discussed the contents of the
2 agreement with my client. The Plea Agreement accurately and completely sets forth
3 the entirety of the agreement between the parties. I concur in my client's decision to
4 plead guilty as set forth in the Plea Agreement. There is no legal reason why the
5 Court should not accept Defendant's plea of guilty.

6
7 

8 Colin Prince
9 Deputy Federal Defender

2/17/22
Date